No. 14-232

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

REPLY BRIEF

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INTRODUCTION

The Commission's redistricting scheme diluted the votes of 3.9 million Arizona citizens in eighteen legislative districts. The district court found the Commission systematically malapportioned Arizona's legislative districts for two reasons. First, the Commission desired to gain partisan advantage for the Democrat party (an objective the district court assumed to be illegitimate); second, the Commission desired to secure Justice Department preclearance under Section 5 of the Voting Rights Act.[1] Importantly, the district court did *not* find drawing unequally-populated districts was necessary to achieve any of the neutral redistricting criteria (such as keeping counties in the same district) enumerated in Arizona's Constitution. Ariz. Const. art. IV, pt. 2, § 1(14)(F).[2] And, in contrast to the malapportioned state legislative districts, when the Commission drew Arizona's congressional districts, it did so with zero deviation.[3]

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1. *Harris* v. *Arizona Indep. Redistricting Comm'n*, 993 F. Supp.2d 1042 (D. Ariz. 2014), reprinted in Jurisdictional Statement Appendix (J.S.App.) 36a, n.7; 63a, n.10; 38a; 107a-108a.

2. The Arizona constitution directs the Commission to create districts that are equally-populated, contiguous and compact, to preserve communities of interest and geographic features such as municipal and county boundaries. And, the Arizona constitution directed the Commission to create politically competitive districts to the extent "it would create no significant detriment to the other goals." Ariz. Const. art. IV, pt. 2, § 1(14)(F).

3. See the Commission's website at: <http://azredistricting.org/Maps/Final-Maps/Congressional/Reports/Final%20Congressional%20Districts%20-%20Population%20Data%20Table.pdf> (last visited November 24, 2015).

There is no question the Commission's apportionment of Arizona's state legislature violates the one-person, one-vote principle this Court announced in *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964).[4] This appeal asks whether the Commission's violation of the one-person, one-vote principle can be justified by a desire to gain partisan advantage or, alternatively, to win Justice Department preclearance approval and, if the latter, whether, this justification for unequally-populated districts is still valid after this Court's decision in *Shelby County, Ala.* v. *Holder*, 133 S. Ct. 2612 (2013).

The Commission (and allied *amici* defending the Commission's malapportioned scheme) sound three themes. *First*, they contend there is a "safe harbor" allowing the Commission to violate the one-person, one-vote guarantee for any reason so long as the deviation does not exceed 10%. *Second*, they claim the Commission's "good faith" belief that it needed to underpopulate twelve districts to obtain Justice Department approval justifies a reapportionment scheme that dilutes the votes of millions of Arizona citizens. And, *third*, they suggest federalism and state sovereignty require this Court to defer to the Commission's reapportionment scheme even when the scheme violates the one-person, one-vote principle.

Each of these arguments is wrong.

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4. The ideal population for each of Arizona's 30 legislative districts is 213,067. See Suppl. J.A. 59. 3,907,652 Arizona citizens are assigned to eighteen overpopulated districts where their vote is diluted, and 2,484,365 Arizona citizens are assigned to twelve favored districts where the weight of their vote is increased.

ARGUMENT

I. There is no 10% "safe harbor" and, to the extent there is a burden-shifting rule when a redistricting scheme deviates by less than 10%, the district court found the malapportioned districts were not necessary to achieve a legitimate state policy free from arbitrariness or discrimination.

The centerpiece of the Commission's argument is the existence of a supposed "safe harbor" permitting the Commission to dilute citizens' votes up to 10% without judicial oversight. AIRC Br. p. 30 ("Population deviations under 10% in legislative district plans are considered *de minimis* population variances that generally do not require state justification."). The Commission claims this Court established this 10% safe-harbor in *Brown* v. *Thomson*, 462 U.S. 835 (1983).

The United States similarly argues this Court has "adopted a strong presumption" that an "apportionment plan with deviations under 10% is constitutional." U.S. Br. p. 12. And, "In order to overcome the strong presumption of constitutionality and impose a burden of justification on the state, a plaintiff challenging minor deviations must come forward with sufficient evidence to infer that a redistricting plan reflects invidious discrimination." *Id.* at 13 (citing *Gaffney* v. *Cummings*, 412 U.S. 735, 740-41 (1973)).

First, there is no 10% "safe harbor" allowing redistricting schemes to violate the one-person, one-vote principle. *Second*, the district court found the only reason the Commission malapportioned Arizona's legislature was

the Commission's desire to (a) confer partisan advantage on the Democrat Party; and, (b) obtain Justice Department preclearance – a consideration that is no longer relevant after *Shelby County*. Neither objective is a rational and legitimate state policy which justifies diluting the votes of disfavored citizens in violation of the one-person, one-vote principle.

A. There is no 10% "safe harbor" from the one-person, one-vote principle.

We begin with the fundamental principle this Court announced in *Reynolds*.

> [T]he right of suffrage is a fundamental matter in a free and democratic society. *** any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *** Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. *** To say that a vote is worth more in one district than in another would run counter to our fundamental ideas of democratic government.
>
> *Reynolds*, 377 U.S. at 562-64.

Beginning in the late 1950s this Court debated whether reapportionment disputes were justiciable. *Colegrove* v. *Green*, 328 U.S. 549 (1946), and *Baker* v. *Carr*, 369 U.S. 186 (1962), are the leading decisions in this debate. Justices Frankfurter and Harlan argued reapportioning state legislative and congressional districts was not a justiciable

controversy and they said reapportionment was a political question beyond this Court's authority to superintend. *Id.* Justices Frankfurter and Harlan counseled this Court to avoid jumping into the "political thicket."[5] But, over their dissent, this Court found itself constitutionally obligated to superintend the Constitution's guarantee of equal protection. Justice Douglas summarized this point, "the Court has never thought that the protection of voting rights was beyond judicial cognizance. Today's treatment of those cases removes the only impediment to judicial cognizance ***." *Baker v. Carr*, 369 U.S. 186, 249-50 (1962) (Douglas, J., concurring). Justice Clark's separate concurrence in *Baker* provides further justification for this Court superintending, and invalidating when necessary, state reapportionment schemes that are a "crazy quilt" of inequality. *Id.* at 260. In *Gray* v. *Sanders*, 372 U.S. 368, 382 (1963), this Court held, "Within a given constituency, there can be room for but a single constitutional rule – one voter, one vote."[6]

This Court recognized the Fourteenth Amendment's Equal Protection Clause guarantees equal weight to every citizen's vote – the one-person, one-vote principle. "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." *Gray*, 372 U.S. at 382.

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5. *Colegrove*, 328 U.S. at 556. Justices Frankfurter and Harlan lost this debate.

6. Citing *United States* v. *Classic*, 313 U.S. 299 (1941).

In 1964 this Court decided seven cases in which the one-person, one-vote principle governing reapportionment of state legislative and congressional districts was given full flower.[7] Since 1964 this Court has been unwavering in its support of this one-person, one-vote principle.

There is no magic number below which a state may freely deviate from population equality (even "minor" deviations) without a legitimate and rational reason to do so.[8] In *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964), this Court noted:

> [Reviewing the legitimacy of a redistrict scheme] does not lend itself to any such uniform formula, and it is neither practical nor desirable

7. *Wesberrry* v. *Sanders*, 376 U.S. 1 (1964), *Reynolds* v. *Sims*, 377 U.S. 533 (1964), *Roman* v. *Sincock*, 377 U.S. 695 (1964), *Davis* v. *Mann*, 377 U.S. 678 (1964), *WMAC* v. *Lamenzo*, 377 U.S. 633 (1964), *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964), and *Lucus* v. *Colorado*, 377 U.S. 713 (1964).

8. In *Reynolds*, 377 U.S. at 533, this Court held "mathematical exactness or precision is not a workable constitution requirement." This statement was a recognition of the census information and mapping technology available a half-century ago. We now have powerful computers, Global Positioning Systems and Global Information Systems that allow much more precise mapping and districting of voting districts. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring) ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months."). This modern technology not only allows voting districts to be created with much more precision to achieve the one-person, one-vote standard but it also allows political operatives much greater ability to model and determine the partisan political behavior of voting districts. *Id.*

> to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a *faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.*[9]

Similarly, this Court emphasized "the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State.'" *Mahan* v. *Howell*, 410 U.S. 315, 328 (1973) (quoting *Swann* v. *Adams*, 385 U.S. 440, 445 (1967)). In *Mahan* this Court upheld a 16% population deviation in Virginia's senate districts because the deviation was incidental to the state legislature's neutral policy of creating legislative districts that preserved county boundaries. *Id.* In *Kilpartick* v. *Preisler*, 394 U.S. 526, 531 (1969), this Court explained, "[t]oleration of even small deviations detracts from" the constitutional command of "equal representation for equal numbers of people ***." Only those "limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown," are permissible." *Id.*; see also *Abate* v. *Mundt*, 403 U.S. 182, 188 (1971) (Brennan, J., dissenting).

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9. Emphasis added.

We do not dispute the ability of a state to reapportion its legislature making minor deviations from perfect equality when those deviations are the necessary result of achieving a rational and legitimate state policy such as keeping political subdivisions intact and in a single district. But that is not this case here.

The Commission and its defenders make too much of *Brown*. *Brown* was an "extraordinarily narrow" plurality decision "empty of likely precedential value." *Brown*, 462 U.S. at 850 (Brennan, J., dissenting).

In *Brown*, Wyoming's constitution provided that each county should have at least one representative in the Wyoming state legislature. This meant that Wyoming's least-populated county, Niobrara County, had one representative even though the population of Niobrara County was 2,924 less than the ideal district population of 7,337.[10] Wyoming's state legislature reapportioned its 64-member legislature granting the residents of Niobrara County one representative instead of combining Niobrara County with a neighboring county and reducing the legislature to 63 seats.

The Wyoming legislature could have reduced the size of the legislature and eliminated the Niobrara County representative. Had it chosen to do so, each individual member of Wyoming's legislature would have enjoyed incrementally increased political power. But the Wyoming legislature instead acted contrary to the legislators' personal political interest and adopted a reapportionment

10. The "ideal population" is the total population of the state divided by the total number of legislative districts.

plan that, consistent with Wyoming's constitution, granted the residents of Niobrara County a representative. Wyoming's legislature found "the policy of this state is to preserve the integrity of county boundaries as election districts for the House of Representatives." *Id.* at 839, n.4.[11]

Justice Powell, writing for the plurality of three justices, noted, "The issue in this case concerns only Niobrara County." *Id.* at 839. And, in this context, noted, "We have recognized that some deviations from population equality may be necessary to permit States to pursue other legitimate objectives such as 'maintain[ing] the integrity of various political subdivisions' and 'provid[ing] for compact districts of contiguous territory.'" *Id.* at 842.

Justices O'Connor and Stevens concurred but only because the holding involved the limited question of Niobrara County being granted a representative and not because they endorsed the population deviations in Wyoming's state-wide reapportionment scheme. *Id.* at 850.

Four justices dissented and, Justice Brennan noted the "narrow" and "limited" holding reached by the plurality. *Brown*, 462 U.S. at 850. Moreover, *Brown* was deemed "neither authority for nor relevant to the question of the validity of" Wyoming's subsequent redistricting plan by the three-judge U.S. District Court for the District of Wyoming in *Gorin* v. *Karpan*, 775 F. Supp. 1430, 1443 (D. Wyo 1991) (holding *Brown* turned on narrower issues

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11. Wyoming's reapportionment of its state legislature was by elected and politically-accountable members of Wyoming's legislature – not an unelected and politically unaccountable commission.

than were relevant in the subsequent 1991 Wyoming redistricting plan).

It is true that Justice Powell wrote, "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. *** A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."[12] But only two other justices, Burger and Rehnquist, joined this statement, and Justices Stevens and O'Connor separately concurred to qualify their assent.

Brown and *Gaffney* v. *Cummings*, 412 U.S. 735 (1973) – the two cases upon which the defenders primarily rely – do not hold that population deviations of less than 10% are immune from judicial review. Quite the contrary. In each case the Court *considered* at length and in great detail the justification for the deviation and found the deviation was justified by a neutral state policy of drawing districts that incorporated political subdivisions. *Gaffney* involved a reapportionment of the Connecticut General Assembly that involved variations from strict mathematical equality due to the neutral state policy of preserving town boundaries pursuant to a state constitutional policy that it do so. 412 U.S. at 737 ("In Connecticut, towns rather than counties are the basic unit of local government. *** The State Constitution provides that, 'no town shall be divided' for the purpose of creating House districts ***.").

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12. *Brown*, 462 U.S. at 842-43 (citing *Connor* v. *Finch*, 431 U.S. 407, 418 (1977), and *White* v. *Regester*, 412 U.S. 755, 764 (1973), as support for the first point and *Swann* v. *Adams*, 385 U.S. 440, 444 (1967), for the second point).

This Court repudiated the notion of a 10% "safe-harbor" when it affirmed the three-judge district court decision in *Larios* v. *Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947, 949 (2004). In *Larios* this Court denied review of a three-judge district court's decision holding a reapportionment plan with deviations less than 10% unconstitutional. Justice Stevens, joined by Justice Breyer, noted "[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation."

B. The district court found the Commission diluted the votes of disfavored citizens for illegitimate and discriminatory reasons.

We do not say absolute mathematical perfection is required.[13] Rather, we say there is no "safe-harbor" allowing the Commission to violate the constitutional guarantee of equal protection. A redistricting scheme that deviates from the one-person, one-vote principle, even by a "minor" amount of 10%, must still be justified by a legitimate state objective like keeping counties in the same district.

Further, as Judge Wake recognized, the "10% rule" is not a "safe harbor" but a burden-shifting principle. *Harris*, J.S.App. 115a-116a. Judge Wake correctly

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13. "This Court has rejected a more stringent standard of mathematical precision, first, in order to protect the quintessential sovereign functions that states exercise when they draw their own legislative districts." AIRC Br. p. 31.

explained "[f]alling below 10% does not make population deviations constitutionally insignificant. It just changes who has the burden of proof." *Id.* at 136a.

The district court held the Commission unequally-populated Arizona's state legislative districts to accomplish two ends. First, to gain a partisan advantage for the Democrat party; and second, to satisfy the Commission's perceived belief that malapportioned districts were necessary to gain Justice Department preclearance. So, do these two objectives justify diluting the votes of more than 3 million Arizona citizens?

The Commission's consultant wrongly advised the Commission that "underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent." *Harris*, J.S.App. 30a. And the Commission wrongly relied on this notion. A partisan desire to benefit the Democrat party and a perceived "good faith" belief the Justice Department required malapportioned districts to preclear the Commission's reapportionment scheme were the only two reasons the district court found to justify the vote dilution in the Commission's reapportionment scheme.

As Judge Wake noted, "Judge Clifton correctly finds that the IRC was actually motivated by both party advantage and hope for Voting Rights Act preclearance. So we have a majority for that finding of fact." J.S.App. 107a. Judge Wake explained, "the Commission continued adjusting the map with an eye to depopulation for party advantage even after the cover of the Voting Rights Act played out." *Id.* at 139a. So, even if the "Commission's first acts of depopulation had the cover [provided by the

Voting Rights Act], the last acts did not." *Id.* Judge Clifton likewise noted, "There's a thumb on the scale and the question becomes what kind of thumb is it or what is the thumb pressing for?" Tr. Trans. p. 1241 (13-15).

District 8 is emblematic of the Commission's illegitimate objectives. The District Court found that Commissioner McNulty presented changes to District 8 "as an opportunity to make District 8 into a more competitive district," but in practice, "that simply meant making District 8 into a more Democratic district." J.S.App. 41a. What was missing was any attempt "to create a series of competitive districts out of both Democrat- and Republican-leaning districts" or "defined standards evenhandedly [applied] across the state." *Id.* at 42a. Instead, she sought to make a single Republican-leaning district more amenable to "Democratic interests." *Id.* And there was no question that the Commission was aware of the partisan implications that changes in District 8 would have, since both Republican commissioners recognized that packing Republican voters into the over-populated District 11 would "aid Democratic prospects in District 8." *Id.* Thus, the underpopulation of District 8 can only be explained as an exercise in partisanship, since it cannot be explained by having any relevance to preclearance.

Thus, a majority of the three-judge district court held partisanship was one of the two reasons the Commission crafted its apportionment scheme. Judge Wake explained the Commission engaged in "systematic population inequality for party advantage that is not only provable but entirely obvious as a matter of statistics alone." J.S.App. 120a.

The district court assumed partisanship is an illegitimate reason to dilute the votes of disfavored citizens. J.S.App. 35a-36a. But Judges Clifton and Silver nonetheless affirmed the redistricting scheme because they believed the Commission had a "good faith" desire to win Justice Department preclearance and believed that malapportioning twelve districts and thereby diluting the vote of more than 3 million Arizona citizens was necessary to win Justice Department approval. *Id.* at 4a.

The Commission's malapportionment of Arizona's state legislature is contrary to this Court's one-person, one-vote principle, contrary to the Equal Protection Clause of the United States Constitution and contrary to the direction of Arizona's state constitution that likewise requires equally-populated legislative districts.

II. The Voting Rights Act neither compels nor justifies vote dilution.

The district court assumed that obtaining a partisan advantage for the Democrat party was not a legitimate reason to dilute the vote of Arizona citizens in disfavored districts' votes while overweighting the vote of other Arizona citizens in favored districts. J.S.App. 36a ("We assume that seeking partisan advantage is not a legitimate consideration ***."). But two judges, Clifton and Silver, nonetheless affirmed the Commission's malapportioned legislative districts because they believed the Commission malapportioned Arizona's legislature to win Justice Department preclearance on the first submission of its reapportionment scheme.

The Commission's "desire-for-preclearance" excuse for diluting almost 3 million Arizonans votes fails for two reasons.

First, the Voting Rights Act does not, and cannot, compel state malapportioned districts violating the constitutional one-person, one-vote principle. A statute cannot compel action that violates the Constitution. This Court held, "[w]e do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Miller* v. *Johnson*, 595 U.S. 900, 922 (1995).

Second, even if the Commission genuinely believed systematically diluting some citizens' votes was necessary to obtain preclearance, this Court's decision in *Shelby County* invalidates the legitimacy of that justification. As Judge Wake explained, "Assuming we could give Section 5 preclearance continuing reach into the future, it would be extraordinary that Congress used a law protecting equality of voting rights to authorize systematic partisan malapportionment, even defeating state law that prohibits it." J.S.App. 144a. And, Judge Wake further observed, "systematic population inequality that is otherwise irrational and discriminatory is a reasonable means to obtain preclearance." *Id.* at 106a.

A. The Voting Rights Act does not compel vote dilution.

The Commission defends its unequal redistricting scheme by saying, in essence, the Voting Rights Act made the Commission malapportion Arizona's legislature to gain Justice Department preclearance. The Commission's

advisor, Adelson, told the Commission "underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent." *Harris*, J.S.App. 30a.

The district court found the Commission relied upon Adelson's advice. But Adelson was wrong. The Voting Rights Act does not compel vote dilution and the Justice Department cannot compel vote dilution as a condition upon which to grant preclearance. See *Miller*, 595 U.S. at 922.

Section 5 of the Voting Rights Act "warrants a denial of preclearance if a covered jurisdiction's voting change 'ha[s] the purpose *** or effect of denying or abridging the right to vote on account of race or color." *Reno* v. *Bossier Parish School Bd.*, 520 U.S. 471, 485 (1997) (quoting 42 U.S.C. 1973c). This means a covered jurisdiction may not reapportion voting districts in a manner "that would lead to a retrogression in the position of racial minorities. Accordingly, we have adhered to the view that the only 'effect' that violates § 5 is a retrogressive one." *Id.* at 487 (quoting *Beer* v. *United States*, 446 U.S. 130, 141 (1976), and citing *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983)).

The Commission and its defenders offer the Justice Department's inscrutability in administering Section 5 preclearance as justification for the Commission "overshooting the mark" and diluting the votes of 3 million Arizona citizens.

In essence the Commission says, "We had no idea how many minority ability-to-elect districts the Justice Department would require to preclear our reapportionment scheme so we created twelve underpopulated districts in the hope that would satisfy the Justice Department and win preclearance."

There were a lot of problems with the Justice Department's preclearance regime before *Shelby County*. As the district court held:

> the state does not know how many benchmark districts the Department believed there were nor how many ability-to-elect districts the Department concluded were in the proposed plan. Nor does it know whether the new plan barely precleared or could have done with fewer ability-to-elect districts.

Harris, J.S.App. 23a.

Prognosticating whether the Justice Department would grant preclearance was an act of juridical divination similar to predicting the future by reading chicken entrails. See Thomas Hobbes, *Leviathan*, Ch. 12. The "former Justice Department officials" admit this point. "[T]he absence of certainty in" obtaining preclearance because "the non-retrogression standard did not offer up a simplistic, formulaic answer to the benchmark question." Br. of Former DOJ Officials, p. 7.

But one point is undisputed. Section 5 does not require the Commission to violate the one-person, one-vote principle. "Preventing retrogression under Section

5 does not require jurisdictions to violate the one-person, one-vote principle." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7472 (Feb. 9, 2011).

But, even more, what the Commission's ill-informed advisor believed the Justice Department would require to preclear the Commission's reapportionment scheme is entirely irrelevant. This Court explained this point in *Miller*, 515 U.S. at 921-22:

> We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. *** Our presumptive skepticism of all racial classifications prohibits us from accepting on its face the Justice Department's conclusion that racial districting is necessary under the [Voting Rights] Act. *** Were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. *** For the same reasons, we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act.[14]

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14. *Miller* was decided in the context of a racial gerrymander challenge to congressional districts but the point quoted above is equally valid in the present context. See *Bossier Parish School*

So, does the bad advice of an ill-informed advisor, even if accepted in "good faith," justify the Commission malapportioning Arizona's state legislature and diluting the votes of close to 3 million Arizona citizens? Under this Court's precedent it does not. This Court emphatically places the focus on the individual Arizona voters – not the Commission.

B. Even if the Voting Rights Act once justified vote dilution, that is no longer so after *Shelby County*.

Even if diluting some disfavored citizens' votes and overweighting the votes of other favored citizens was required to gain preclearance, this justification is no longer valid after this Court's decision in *Shelby County*. Judge Wake explained "even if Section 5 could justify population inequality before *Shelby County*, it cannot now." J.S.App. 125a.

The Commission (and its defenders) justify the malapportioned districts by arguing the Commission had a "good faith" belief that it must under-populate (and overweight the votes) of citizens in twelve districts, and dilute the votes of those in other districts, to obtain preclearance. But this is a misplaced focus. The Equal Protection Clause guarantees the *rights of Arizona voters*. The focus of the Equal Protection Clause is on the right of individuals not the Commission's supposed justification for diluting these individuals' votes.

Bd., 520 U.S. at 483 (declining to "defer to the Attorney General's regulations interpreting the [Voting Rights] Act.").

To be sure, when the Commission reapportioned Arizona's legislature this Court had not yet decided *Shelby County*. But, when the district court reviewed the Commission's redistricting scheme the district court did so in light of *Shelby County*.

Shelby County teaches several lessons. (1) The Voting Rights Act was an "extraordinary" and "exceptional" departure from principles of federalism and state sovereignty. (2) The unique set of circumstances upon which Congress premised the Voting Rights Act's intrusion into state sovereignty were based upon conditions existing a half-century ago. This point is especially relevant to Arizona which Congress swept into the Voting Rights Act preclearance coverage because of an anachronistic English language test Arizona had in 1912 and which Arizona repealed in 1972. Arizona was not part of the Confederacy. Arizona had no Jim Crow laws. And yet Arizona was included in Section 5 preclearance because of how Congress wrote the preclearance formula in 1975. See our opening brief p. 39, n.29.

Because it no longer reflected reality, this Court "declar[ed] § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County*, 133 S.Ct. at 2631.

To sustain the Commission's malapportionment because *Shelby County* had not been decided when the map was drawn (even though *Shelby County* was decided when the district court reviewed the map) is to ignore this Court's decision. The commission would delay implementation of *Shelby County* until after 2020.

This is akin to saying a segregated "separate but equal" school district is constitutional after *Brown* v. *Bd. of Education*, 347 U.S. 483 (1954), because the school district was segregated before *Brown* when "separate but equal" schools were allowed under *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

C. A parade of horribles will not follow if this Court holds Arizona's state legislature must be equally-apportioned in conformity with the one-person, one-vote principle.

The Commission, and allied *amici*, enrich their argument by claiming a parade of horribles will ensue should this Court not affirm the Commission's malapportioned districts. The Commission claims the Justice Department precleared more than 1,500 other jurisdictions and, if the Court accepts these Arizona voters' argument, every one of these 1,500 other jurisdictions reapportionment plan is invalid and must now be redrawn. AIRC Br. pp. 51-54 and Former DOJ Officials Br. pp. 9-14.

The Commission and its defenders seek succor in decisions (such as *Gaffney* and *Brown*) allowing minor population deviations *incidentally* resulting from the implementation of legitimate and rational state policies. But that is not what exists here. The almost 10% deviation in the Commission's scheme is not an incidental result of the desire to achieve a legitimate state policy. Rather the Commission *intended* to achieve illegitimate ends. The population deviations in the Commission's plan were purposeful and designed to satisfy partisan ends. Since there is nothing "incidental" about the population

deviation present in the plan, the cases allowing incidental population deviations resulting from pursuit of a neutral state policy do not apply.

Thus it does not follow that requiring the Commission to equally-populate Arizona's legislature means that the apportionment of every other jurisdiction that sought Section 5 preclearance is now invalid.

III. Requiring Arizona's legislative districts to be equally-populated does not violate principles of federalism nor does it intrude upon Arizona's sovereignty.

The Commission and the United States claim principles of federalism and state sovereignty require this Court to defer to the Commission's unequal districting scheme. See AIRC Br. pp. 31-32; U.S. Br. pp. 25-29.[15] There are three problems with this argument.

First, invoking federalism and state sovereignty as reasons to justify the Commission's malapportioned legislative districts rests upon an unstated premise

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15. We find it especially ironic the Solicitor General invokes the concept of Arizona's state sovereignty and federalism to defend the Commission's malapportionment. The Solicitor General now says judging Arizona's redistricting process after *Shelby* "contravenes this Court's longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan ***." U.S. Br. p. 34 (internal quotation omitted). Yet in *Shelby County* the Solicitor General argued the opposite. See Brief of Federal Respondent, *Shelby County, Ala.* v. *Holder*, 2013 WL 315242, *13, *19 (2013) ("Congress's legitimate enforcement of those restrictions is no invasion of State sovereignty.") (internal quotation omitted).

that Arizona intended the Commission to unequally populate these districts contrary to the one-person, one-vote principle. But this is not so. Arizona's constitution expressly *forbids* unequally-populated districts. J.S.App. 150a (Ariz. Const. art. 4, pt. 2 § 1(14)(B). The Arizona constitution also forbids the Commission from considering partisanship when drawing its initial map and requires competitive districts.[16] J.S.App. 150a. So, requiring the Commission to equally-populate the legislative districts is merely requiring the Commission to follow Arizona law. There is no conflict between this Court's one-person, one-vote principle as required by the Equal Protection Clause of the United States Constitution and Arizona's state constitution which requires the same thing. There is no dissonance between what the United States Constitution and the Arizona state constitution require the Commission to do – draw equally-populated legislative districts.

Judge Wake noted the foolishness of the argument:

> The first novel thing about this case is that, thanks to the reform of redistricting processes and standards in Arizona, state law itself now excludes most of the traditional pretexts for partisan inequality. Of necessity, the Commission summons up only the Voting Rights Act as redeeming what is otherwise old-fashioned malapportionment. The second thing novel about this case is that, the Arizona voters

16. The Arizona constitution requires the Commission to draw an initial "grid" map with "districts of equal population in a grid-like pattern across the state." J.S.App. 150a (Ariz. Const. art. 4, pt. 2 § 1(14)). The grid map drawn by the Commission had a total population deviation of 4.07%. J.S.App. 19a.

> having cast out that grossest of redistricting abuses, a federal law is now invoked to bless its return.
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> *Harris*, J.S.App. 144a.

Second, the Equal Protection Clause of the United States Constitution governs this case, and deference is not warranted.

Finally, the Commission is *not* the Arizona legislature. We recognize this Court upheld the Commission's authority to reapportion Arizona's congressional districts against an Election Clause challenge. See *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). But the Commission *equally-populated* Arizona's congressional districts whereas, here, the Commission did not create equally-populated districts.

The Commission is not granted free-range authority to draw Arizona's legislative districts however it wishes. The Commission is constrained by the specific criteria Arizona's state constitution requires the Commission to follow when it reapportions Arizona's legislature. The Commission was required to draw an initial "grid map" with "districts of equal population in a grid-like pattern across the state." J.S.App. 150a (Ariz. Const. art 4, pt. 2 § 1(14)) and to adjust the Grid Map to comport with the other neutral redistricting criteria.

When the Commission's partisanship, especially the behavior of Chairwoman Mathis, became evident, Arizona's legislature tried to correct the Commission's actions. Arizona's Governor, supported by two-thirds of the Arizona Senate, removed Chairman Mathis for

"substantial neglect of duty and gross misconduct in office," including Mathis' failure "to adjust the grid map as necessary to accommodate all of the goals set forth in Arizona Constitution Art. 4, Pt. 2, § 1(14) ***." *Ariz. Indep. Redistricting Comm'n* v. *Brewer*, 275 P.3d 1267, 1275, 1277 (Ariz. 2012); see also *Ariz. State Legislature*, 135 S. Ct. at 2691. The Arizona Supreme Court overturned this action because "As a matter of law, the Governor cannot base a removal decision on a Commissioner's alleged failure to comply with constitutional map-adjusting criteria before completion and review of the final maps." *Brewer*, 275 P.3d at 1277.

The inability of Arizona's legislature and Governor to remove Chairwoman Mathis for partisan neglect of her duties demonstrates the Commission is politically unaccountable. This point is further demonstrated by the fact that Arizona's Secretary of State, Michele Reagan, represented by Arizona's Attorney General, Mark Brnovich, join the Arizona citizens challenging the Commission and join in the request that this Court overturn the Commission's malapportionment and remand instructing the Commission to reapportion Arizona's state legislature in conformity with the Equal Protection Clause principle of one-person, one-vote and the corresponding provisions of Arizona's state constitution. And, unless this Court acts, the malapportioned districts the Commission drew will remain in effect until after 2020.

Justice Kennedy noted the importance of political accountability as a check in the redistricting process. See our opening brief, p. 56, n.45 (quoting oral argument in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006)). As the history of this case demonstrates, the Commission is not politically accountable.

CONCLUSION

Deviating from the constitutional command of one-person, one-vote is only permitted when the deviation is minor and necessary to achieve a legitimate and neutral redistricting consideration. This Court has never held partisanship or obtaining Justice Department preclearance justify even "minor" deviations from population equality.

The district court wrongly sustained the Commission's districting scheme even though it deviated from the one-person, one-vote principle by almost 10% and the deviation was not necessary to achieve any legitimate purpose. This Court should vacate the district court's judgment and remand instructing the Commission to apportion Arizona's legislature consistent with the Equal Protection Clause guarantee of one-person, one-vote.

Respectfully submitted,

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